Supreme Court of the United States

October Term, 1978

No. 78-1327

THE BOEING COMPANY (formerly THE BOEING AIRPLANE COMPANY), *et al.*,
Petitioners,

v.

WILLIAM R. VAN GEMERT, *et al.*,
Respondents.

Brief for Respondents in Opposition to a Petition for a Writ of Certiorari

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BRIEF FOR RESPONDENTS

The Question Presented

The issuer of convertible debentures in bearer form wrongfully rejected tenders by holders who asked it to convert their debentures into common stock; a class action in behalf of the holders resulted in a judgment that a fixed sum be paid by the issuer with respect to each debenture; that sum multiplied by the number of debentures has been deposited awaiting claims by the holders; are the fees and costs of counsel to be allocated equally to all of the debentures or only to those for which claims are filed?

The Opinion of the Court of Appeals

The masterful opinion of Chief Judge Kaufman (App. pp. 1a-17a) makes superfluous any comment by us on the central issue.

We limit ourselves, therefore, to answering directly the alleged law reason and the alleged policy reason offered as justification for a review.

ANSWERING POINT I

Defendant asks this court to repudiate its opinion in *Alyeska*.

One of the ironies in the petition is that defendant seeks to assimilate this case to *Alyeska;* whereas the opinion in *Alyeska* took great care to distinguish that case from this one.

Alyeska was brought in behalf of an amorphous constituency, called "the public," to enjoin the government from issuing permits for construction of a pipeline. The litigation was successful temporarily and the Court of Appeals awarded attorneys' fees to the representatives of "the public" on the theory that their attorneys performed the services of a "private attorney general" (421 U. S. 240, 241-2).

The opinion of this Court, after tracing the history of attorneys' fees in the federal courts and recognizing that in this country generally one party does not pay the other's fees, stated that there are two situations in which, indirectly or directly, this is not so, namely:

1) where a "common-fund" has been created or preserved, payment out of the fund comes indirectly from the defendant and

2) where a "common-benefit" has been conferred the payment may come directly from the defendant.

The present case is one of a common fund. The *Alyeska* opinion could not have been clearer in distinguishing this case from *Alyeska.* The court, through Mr. Justice White, wrote:

> "To be sure, the fee statutes have been construed to allow, in limited situations, a reasonable attorney's fee to the prevailing party in excess of the small sums permitted by §1923. In *Trustees v. Greenough,* 105 U. S. 527 (1882), the 1853 Act was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees from the fund or property itself or directly from the other parties enjoying the benefit" (p. 257).

In a footnote the opinion quoted Mr. Justice Bradley to the effect that the fee statutes were not intended to interfere with the historic power of the court

> "in cases of administration of funds under its control, to make such allowances to the parties out of the fund as justice and equity may require" (pp. 257-8).

In *Alyeska* the court stated that, on the facts before it, to apply the common-benefit exception would be to " 'stretch it totally outside its basic rationale' " (p. 245). The opinion recognized that *Sprague v. Ticonic National Bank,* 307 U. S. 161 (1939) "might be read" as applying the *Greenough* or "common fund" doctrine

> "But any such suggestion [that the common-benefit and the common-fund doctrine are one] is without support either in the opinion in *Greenough,* which was limited to a common-fund rationale, or in the express terms of the statute" (p. 258, footnote 30).

Thus, this court could not have been clearer in distinguishing the common fund from the common benefit; nor could it have been clearer in holding that *Alyeska* fell neither within the common-fund exception nor the common-benefit exception. The holding was that it was not for the courts to make a new category—one which did not involve a common fund and one which stretched the common-benefit exception unduly.

ANSWERING POINT II

Public policy supports the holding of the Court of Appeals.

The opinion of Chief Judge Kaufman describes the public policy interests of plaintiffs, plaintiffs' attorneys and defendants in class actions (App. pp. 14a-17a). Judge Kaufman points out that the fees of attorneys in a class action are now fixed by a number of considerations among which the amount of the recovery, but not the number of claims filed, is one (App. 14a, footnote 18). Therefore, if Boeing's contention were accepted, the failure of some to file claims would injure those who do file claims and would benefit either the party adjudged to pay the sum or a state which would receive a windfall. It follows that the longer the defendant can protract the litigation the greater the burden which it can impose on the claimants and the greater the benefit which it or the state will receive. As Judge Kaufman points out, the ruling sought by

Boeing would put the victim at a disadvantage either way —it would stimulate the lawyers to settle quickly "for less than adequate sums," failing which it would cause the surviving claimants to pay more than their share of the fees when the litigation continues (App. pp. 16a-17a).

Boeing argues that if a fee is charged against the debentures for which no claim is made, the fee is being charged to money which "belongs to others" (p. 4) or comes "from money that did not belong to the class because it was never claimed" (p. 6) or "from money which belongs either to Boeing, the loser in this litigation, or to one or more state governments under theories of abandoned propery" (p. 10).

This is an abuse of the word "belongs." It has been adjudged that the money is to be paid to the holders of identifiable debentures. If the money "belongs" to anybody, it belongs to the unidentified holders of identified bonds and, contrary to what Boeing says, those holders are members of the class. If the money is ultimately paid to Boeing or to the state it will not be because the money belongs to either of them but because the person entitled to it cannot be found.

If the claiming members of the class are to share the full legal cost then the party benefiting will be the party which has been adjudged obligated to pay out of that money or a state which receives it as a windfall.

As we have said, if the benefit of the reduced number of claims will accrue to the defendant then there is every reason for the defendant to protract the litigation. This case is an excellent example. In thirteen years a) people have died, b) addresses have changed, c) brokers have gone out of business, d) banks have destroyed their records and so forth. In each year of the thirteen there have undoubtedly been added a new number of unfindable holders.

It would serve Boeing well to prolong the litigation if it is to receive back intact more each year of the dollars which it has deposited for non-claimants. And every such delay would, under Boeing's theory, add to the burden borne by the innocent plaintiffs who do file claims.

POINT III

The discretion of the court should not be exercised in favor of the granting of certiorari.

This is doubtless a case of first impression because so few of such cases have been fought through to decision by the Court. It has no application to settlements where the fees are agreed upon by the parties.

This is not a class action for the lady who overpaid $10 for her dress or the customer who overpaid $2 for his medicines. It is not a case of fluid recovery where the law has been pretty well settled by *Eisen v. Carlisle & Jacquelin*, 479 F. 2d 1005 (2d Cir. 1973), remanded 417 U. S. 156 (1974).

The justice and the logic are clear; the fees and costs of the total recovery should not be assessed against victims of the wrong. To reward the wrongdoer at the expense of the victims under such circumstances would seem hardly a reason for this court to exercise its discretion to review the decision below.

Dated: New York, N. Y.
March 10, 1979

Respectfully submitted,

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